In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1322

JOSEPH THOMAS MCCAFFREY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A; C.A. 3(1)-3(5))[1] is reported at 372 F. 2d 482.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 1967. A petition for rehearing was

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[1] "C.A." refers to the volume of the record which contains the proceedings in the court of appeals. "R." refers to the volume containing the proceedings in the district court.

denied on March 1, 1967. On March 30, 1967, Mr. Justice White extended the time for filing a petition for a writ of certiorari to April 30, 1967. The petition was filed on April 25. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a genuine printed form for a Selective Service registration certificate, upon which false information has been typed and a false signature purporting to be that of the clerk of the local board has been placed, is a falsely made certificate within the meaning of 50 U.S.C. App. 462(b).

2. Whether the failure to transcribe the grand jury testimony of a government witness—an F.B.I. agent to whom petitioner had made incriminating statements—rendered the admission of the agent's trial testimony plain error, where the agent's written report of petitioner's statements was made available to the defense under 18 U.S.C. 3500.

3. Whether the trial court committed reversible error in declining to give a requested instruction which did not relate to the offense charged.

STATUTE INVOLVED

The text of 50 U.S.C. App. 462(b) is printed at Pet. App. B.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the District of Colorado

under a one-count indictment charging that he knowingly possessed a certificate purporting to be a regularly issued Selective Service registration certificate which he knew to have been falsely made in violation of 50 U.S.C. App. 462(b) (R. 5). On November 12, 1965, petitioner was sentenced to two years' imprisonment, with all but one month suspended (R. 12-13). The court of appeals affirmed.

1. The evidence showed that in September 1964 a stranger asked petitioner whether he would like to purchase a Selective Service card that would indicate he was older than he actually was. Petitioner replied that he would. The stranger took petitioner to his automobile, produced a blank Selective Service registration certificate, typed "Joseph Thomas Scott" in the space provided for the registrant's name, inserted petitioner's physical description in the appropriate blanks, listed a date of birth two years earlier than petitioner's, filled in the remaining spaces, and signed it with a fictitious name as the clerk of the local Colorado board. Petitioner signed the name "Joe Scott" in the space provided for the registrant's signature and paid the stranger five dollars for the card (R. 40; Gov. Exs. 1 and 2).

On March 5, 1965, petitioner presented the card to a roller-rink employee as a means of identification (R. 16-19). The employee, suspecting that the card was not genuine, turned it over to the local office of the F.B.I. (R. 18). An agent interviewed petitioner concerning the certificate, informing him beforehand "that he did not have to say anything, that anything he did say could be used against him in a court of

law, that he was free to consult with an attorney or anyone else" (R. 39). Petitioner then related to the agent the circumstances under which he had acquired the certificate (R. 40).

2. At trial, after the F.B.I. agent had testified concerning petitioner's admissions, petitioner's counsel asked that the government furnish the defense with a transcript of the agent's testimony before the grand jury (R. 41). The attorney for the government informed the court and defense counsel that no reporter had been present at the proceedings and that therefore no transcript was available (R. 41-42). Petitioner's counsel then stated, "on that representation, we will go no further on that part of the motion. We now ask that the Government turn over to us all statements of this witness bearing upon his testimony under 18 U.S.C. 3500" (R. 42). The requested statements were furnished petitioner's counsel (R. 42-43).

3. Petitioner's counsel requested that the court include in its charge to the jury an instruction concerning the statutory presumption whereby a showing that petitioner possessed a certificate not properly issued would permit a finding of intent to use the certificate for purposes of false identification (R. 9, 65-66, 108, 114). The court refused (R. 66, 108). It pointed out that, while such intent was an element of some of the offenses enumerated in Section 462(b), it was not an element of the offense defined by Section 462(b)(5), under which petitioner was charged (R. 65).

ARGUMENT

1. There is no merit to petitioner's contention that, since a genuine Selective Service form was used in making the false registration certificate, it was not a falsely made certificate within the meaning of 50 U.S.C. App. 462(b)(5). As noted by both courts below (R. 74-76; C.A. 3(2)-3(3)), until the blanks of the form were filled in with the spurious information and until a signature was inserted in the space provided for the clerk to sign, there was no certificate, false or otherwise, in existence. The insertions and a signature were necessary to make the form a certificate. The completed certificate was falsely made. See *United States* v. *Naughten*, 195 F. Supp. 157 (N.D. Cal.).

The cases cited by petitioner (Pet. 8) do not support his contention that a certificate using a genuine form cannot be "falsely made." They stand only for the proposition—with which we have no quarrel—that there is a difference between false documents, on the one hand, and genuine documents containing false information, on the other. Not only did the document here contain false information (the age of petitioner); it was a false document. Not having been signed by the clerk or issued by the local board, it was not a true certificate—it certified to nothing.[2]

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[2] Petitioner to the contrary (Pet. 8), *United States* v. *Turner*, 246 F. 2d 228 (C.A. 2), did not hold "that a stolen blank form was a certificate under 462(b)(2)." It held that a form *which had been signed by a member of the local board* before the name of any registrant had been inserted, and which then had been stolen and completed with the insertion

2. The admission of the F.B.I. agent's testimony concerning petitioner's incriminating statements was not plainly erroneous (so as to require reversal despite the failure to preserve the point at trial) because a reporter had not been present to transcribe the agent's grand jury testimony. As noted by the Second Circuit in *United States* v. *Cianchetti*, 315 F. 2d 584, 591, "there is no constitutional requirement that grand jury proceedings be transcribed, and we have been able to uncover no provision of rule or statute which makes transcription mandatory rather than permissive." See, also, *United States* v. *Caruso*, 358 F. 2d 184 (C.A. 2), certiorari denied, 385 U.S. 862; *United States* v. *Labate*, 270 F. 2d 122, 123-124 (C.A. 3), certiorari denied *sub nom. Sussman* v. *United States*, 361 U.S. 900; *United States* v. *Martel*, 17 F.R.D. 326, 328-329 (N.D.N.Y.), appeal dismissed *sub nom. United States* v. *Caiola*, 222 F. 2d 369 (C.A. 2); Orfield, *The Federal Grand Jury*, 22 F.R.D. 343, 452. Furthermore, pursuant to 18 U.S.C. 3500 petitioner's counsel was furnished the agent's entire report of the statements by petitioner—a report more nearly contemporaneous with the statements than had been the agent's testimony before the grand jury.

3. There was no error in the trial court's refusal to include in its charge the instruction requested by petitioner. The requested instruction paraphrased the statutory presumption appearing in the last sentence

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of a fictitious name, was a prescribed certificate under 462 (b) (2). It further noted, in dictum, that possession of such a certificate would constitute an offense under 462(b) (5). 246 F. 2d at 230-231.

of 50 U.S.C. App. 462(b), which concerns the element of intent involved in 462(b)(2) and (4). Since petitioner was charged under 462(b)(5), a subsection in which specific intent is not an element of the offense, the presumption was inapplicable.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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